Citation: R. v. Little
2002 BCCA 2

Date: 20020109
Docket: CA029015
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

STACEY LITTLE

APPELLANT

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Braidwood
The Honourable Madam Justice Saunders

Paul McMurray — Counsel for the Appellant

W. F. Ehrcke, Q.C. — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia, November 7, 2001

Place and Date of Judgment: Vancouver, British Columbia, January 9, 2002

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Braidwood

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Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Stacey Little applies for leave to appeal her sentence and if leave is granted, appeals her sentence of nine months' imprisonment and two years probation on a conviction of public mischief. I would grant leave to appeal the sentence.

[2] The gravaman of Ms. Little's offence is a false allegation she made against a male of sexual assault. The person she falsely accused of this offence was arrested and spent fourteen hours in jail. Four days after making the allegation and after police investigation suggested the allegation was untrue, Ms. Little admitted the allegation was false. She was charged with public mischief and pleaded guilty to the charge. The facts were described by the trial judge:

> The facts of the matter are that last April, after a night of drinking, Stacey saw fit to report to her then boyfriend that she had been sexually assaulted by three individuals in a van behind a bar in Saanich. As a result of that report to her boyfriend, he called the police and as a result of that call, an investigation occurred. The investigation occurred over a period of four days in which a couple of statements were given by the accused to the police. The police had their detectives launch into an investigation. In this day and age, with the amendments to the Criminal Code and the need to deal with these allegations in a serious manner, the police immediately got on to conducting their investigation.

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> The report, in fact, had some credibility in the sense that she had been in a bar and she had been with some individuals, and they did find a van and eventually arrested an individual who spent some fourteen hours in a lockup while under investigation and the subject of a search warrant for his vehicle. However, luckily for him, the investigation revealed some weaknesses to the complaint that Ms. Little had persisted in making and sticking to over the course of four days. Eventually the evidence revealed that the complaint had to be unfounded. The accused then came clean, so to speak, and the suspect was released and cleared.

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[3] The sentencing judge had the benefit of a pre-sentence report and a psychiatric report. He summarized the information contained in these reports:

> Stacey is twenty-seven years of age. She comes from a very troubled past, both as to her upbringing which can only be described as having been very dysfunctional and challenging. She also has a serious substance abuse problem. She has been abusing alcohol for most of her life and drugs as well, and it's only recently that she has been able to get some anticipated help, I'm told, having made arrangements to get some counselling from the local drug and alcohol people in Revelstoke as well as being accepted and referred to Crossroads. ...
>
> Another factor from the court's point of view is the fact that she does suffer from a mental health problem. She's been diagnosed as having bipolar depression or manic depressive, that she has been suicidal and that her health mentally is fragile. As I say, she's twenty-seven. She's currently not in a relationship although she seemed to have been in and out of a number of them, as had been the pattern, unfortunately, of her mother over the course of bringing her up.
>
> ...

[4] Ms. Little did not have a criminal record, although the sentencing judge said:

> She has no record although she is not someone who is unfamiliar with the court process. The Crown has indicated that over the past years she has been the subject of a number of concerns by the police, either as a complainant or a suspect or the subject of a complaint which has resulted in a large number of reports to the police.

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[5] At sentencing the Crown sought a custodial sentence of between nine and 12 months. The defence sought a conditional sentence.

[6] In sentencing Ms. Little to nine months' incarceration and two years' probation, the sentencing judge referred to the seriousness of the offence and the harm done to the system of courts and justice by the lodging of a false complaint of sexual assault, adopting a statement of the Alberta Court of Appeal in ***R. v. Ambrose***, [2001] 1 W.W.R. 117 (Alta. C.A.):

> That particular case [***R. v. Ambrose***] is instructive in that it sets out very clearly and adequately the concerns that society has when these types of offences are committed. As the court indicated in paragraph 31:
>
> > "The harm to the public is even worse. Our whole system of courts and justice depends heavily upon truthful accounts of past occurrences. We have dismantled most of the legal requirements for confirmatory evidence and heavy punishment for very serious crimes,

> other than treason and perjury, may be levied on one person's word. Even if an accused is ultimately acquitted, he or she will likely suffer mental tortures for several years and have to pay huge sums of money to retain lawyers. Even Legal Aid is not really free. One is required to repay it when one can afford to do so.
>
> "If the criminal law were seen to convict the innocent, respect for law and punishment would evaporate. If judges and juries became unwilling to convict without confirmatory evidence, then they would silently reintroduce all of the requirements of confirmatory evidence, which parliament and the Supreme Court of Canada have repealed in the last fifteen years. The evils of such a requirement for confirmation have been well described by the Supreme Court on a number of occasions. If complainants were thought often to cry wolf, in the words of the old fable, then few complainants would be believed and a host of crimes would go unpunished and ultimately undeterred."

[7] The sentencing judge then referred to Ms. Little's intoxication at the time she initially made the false report to her boyfriend, and said:

> The courts are always concerned in trying to strike a balance to seek an individual's rehabilitation, but at the same time the whole range of circumstances and conditions that the court must take into consideration in reaching a just sentence have to be balanced. In this particular case, in spite of your fragile circumstance, I think that it is important that there not only be a message to you, but to the public and any of those of like mind that this type of conduct cannot be accepted, cannot be condoned, and that it has to be denounced, and the only way to clearly denounce it is to tell you

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> and others that if it does take place, you can expect to spend a period of time in jail.
>
> Having reached that conclusion, I am satisfied that an appropriate disposition is one of a sentence of nine months' imprisonment, to be followed by a period of two years' probation.

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[8] On appeal Mr. McMurray for Ms. Little contends that the sentence falls outside the range of sentence appropriate for similar offences by similar offenders, that the sentencing judge failed to consider s. 742.1 of the ***Criminal Code*** as explained in ***R. v. Proulx***, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 2000 S.C.C. 5, that the sentencing judge failed to adequately consider Ms. Little's personal history and that he wrongly took into account Ms. Little's previous experience with the police.

[9] I address this last animadversion first. Although the sentencing judge referred to Ms. Little's exposure to police, in my view a fair reading of his comments shows that he did no more than observe that Ms. Little could reasonably be expected to know, from previous dealings, that the police were likely to embark upon an investigation of the complaint she made. In my view, that observation is fair in the circumstances of the case and as the trial judge drew no impermissible inference from this information when he gave his reasons for imposing the sentence he did, I do not consider this an error which

would entitle this Court to interfere with the sentence imposed. I would not accede to this ground.

[10] The other three grounds all focus on the sentencing judge's conclusion that "the only way to clearly denounce [the conduct] is to tell you and others that if it does take place, you can expect to spend a period of time in jail."

[11] There is not a great body of sentencing jurisprudence on the charge of public mischief arising from a false complaint of sexual assault. Counsel referred to four authorities, two from Ontario and two from Alberta: ***R. v. Hudon*** (1996), 187 A.R. 345 (C.A.); ***R. v. M.B.***, [1997] O.J. No. 492 (Ont.C.J.); ***R. v. Ambrose***, referred to by the sentencing judge in this case; and ***R. v. C.F.***, [2000] O.J. No. 5571 (Ont.C.J.). We were not referred to any similar British Columbia cases.

[12] It is, perhaps, useful to consider the circumstances and reasons of ***R. v. Ambrose***, the decision relied upon by the sentencing judge. Ms. Ambrose was sentenced to two years less a day for falsely accusing a police constable of sexually assaulting her. She had invented a story of rape by the constable while she was locked in a holding cell. She testified at her trial that she was unconscious at the time of the sexual assault but recounted graphic circumstantial evidence suggesting forced sexual intercourse and she sued for

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damages in a civil action. In other words, she did not recant her allegation. Mr. Justice Côté, for the majority, in detailed reasons affirming the sentence, referred to the on-going need for specific deterrence of Ms. Ambrose and the lack of self-rehabilitation, and concluded that deterrence and denunciation were the predominant sentencing objectives for the crime. He then moved to the question of the harm done by the offence, and in the passage quoted by the sentencing judge, said:

> [31] The harm to the public is even worse. Our whole system of courts and justice depends heavily upon truthful accounts of past occurrences. We have dismantled most of the legal requirements for confirmatory evidence. Heavy punishment for very serious crimes (other than treason and perjury) may be levied on one person's word. Even if an accused is ultimately acquitted, he or she will likely suffer mental tortures for several years, and have to pay huge sums of money to retain lawyers. Even legal aid is not really free; one is required to repay it when one can afford to do so.
>
> [32] If the criminal law were seen to convict the innocent, respect for law and punishment would evaporate. If judges and juries became unwilling to convict without confirmatory evidence, then they would silently reintroduce all the requirements of confirmatory evidence which Parliament and the Supreme Court of Canada have repealed in the last fifteen years. The evils of such a requirement for confirmation have been well described by the Supreme Court, on a number of occasions. If complainants were thought often to "cry wolf" (in the words of the old fable), then few complainants would be believed. And a host of crimes would go unpunished and (ultimately) undeterred.

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[13] Chief Justice Fraser, dissenting, stated on this issue:

> [112] Nor is there any reason for singling out someone who is convicted of a false allegation of a sexual offence for punitive treatment. It has been suggested that this is necessary because of the negative impact which false allegations may have on legitimate victims of sexual assault. But if this is so today, the root cause is not the fact that someone has made a false allegation. There is no evidence that false claims in this area are more prevalent than those made in other areas of the law. I cannot accept that it is valid to exact retributive punishment for a false allegation about a sexual offence on the basis that the public is incapable of understanding that one false allegation should not be used to impugn the credibility of an entire class of legitimate victims. Focussing on retribution and imposing disproportionately severe sentences for this kind of public mischief wrongly implies that the problem here is so prevalent that extraordinary measures are warranted. This is tantamount to falling into the same trap which Parliament, the judiciary and the public have sought to avoid the past twenty years, reinforcing as it does the very kind of thinking which prevented the effective prosecution of some grave crimes against women and children. I have already mentioned that the appellant is not the first accused to claim that events occurred differently than the Crown alleges. And yet no one would seriously suggest that it would be appropriate to presume that every accused lies and proceed to evaluate their credibility on that basis whenever they choose to take the witness stand. The answer therefore is not to overreact to false allegations of this kind but to judge every particular case on its own merits rather than perceiving vast social consequences from something which seems to me on these facts to be unique.

[14] Crown counsel urged upon us the principles of general deterrence and denunciation, and the reasoning in ***R. v.***

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Ambrose, saying that the sentencing judge's conclusion that "the only way to denounce [your conduct] is to tell you and others that if it does take place, you can expect to spend a period of time in jail." was correct in the context of this offence, which is a false allegation of sexual assault.

[15] With respect, I consider that the conclusion of the sentencing judge overreaches in considering incarceration as the penalty for the offence. In ***R. v. Proulx***, *supra*, Chief Justice Lamer for the Court said at paras. 102 and 106 as to denunciation:

> 102 ...Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances. ...
> ...
> 106 The amount of denunciation provided by a conditional sentence will be heavily dependent on the circumstances of the offender, the nature of the conditions imposed, and the community in which the sentence is to be served. As a general matter, the more serious the offence and the greater the need for denunciation, the longer and more onerous the conditional sentence should be. However, there may be certain circumstances in which the need for denunciation is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct.

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And as to deterrence he stated at para. 107:

> 107 ... a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences. There is also the possibility of deterrence through the use of community service orders, including those in which the offender may be obliged to speak to members of the community about the evils of the particular criminal conduct in which he or she engaged, assuming the offender were amenable to such a condition. Nevertheless, there may be circumstances in which the need for deterrence will warrant incarceration. This will depend in part on whether the offence is one in which the effects of incarceration are likely to have a real deterrent effect, as well as on the circumstances of the community in which the offences were committed.

[16] To the extent the sentencing judge appeared to consider that a conditional sentence could not be fashioned that would meet the requirements of deterrence and denunciation, I would disagree, and would prefer the view articulated by Chief Justice Fraser set out above. While a false allegation of a criminal offence is a serious matter, and the sentencing judge was correct in referring to denunciation and general deterrence as predominant principles, the requirement to harken to the circumstances of the offence and the offender remain.

[17] The issue is whether the circumstances of this case call for a period of incarceration. Mr. McMurray contended

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vigorously on Ms. Little's behalf that the circumstances of the false complaint, her retraction within days, her remorse for the offence, the absence of a criminal record and Ms. Little's fragile mental health combine to make this an appropriate case for a conditional sentence.

[18] Although in principle a conditional sentence may meet the requirements of deterrence and denunciation, in my view it could only do so on strict terms of house arrest in the vein discussed in ***R. v. Proulx***. The proposed terms here describe virtual house arrest with visits from Ms. Little's family. However, the material before the Court does not satisfy me that such restricted social interaction, in the circumstances of Ms. Little's health and the dynamics of her family as they are made known to the court, would be conducive to Ms. Little's rehabilitation, or even her physical and mental well-being, or that, considering these factors, it would be protective of the community as contemplated by the objectives of the sentencing provisions of the ***Criminal Code***.

[19] I turn then to the length of sentence. Is it fit? In my view, it is over-long in the service of deterrence and denunciation, and fails to adequately account for the mitigating features present here, the prospect of Ms. Little's rehabilitation, and the minimal requirement for specific

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deterrence. In this I consider Ms. Little's admission within four days that her complaint was untrue and her guilty plea at trial, the lack of a prior record and the personal history of Ms. Little.

[20] I recognize that the offence is serious, but in my view the objectives of deterrence and denunciation may be served adequately by a shorter, although still substantial, sentence in the case of this first time offender.

[21] I would grant leave to appeal sentence, allow the appeal to the extent of substituting for the sentence of nine months a sentence of three months' incarceration, and leave untouched the imposition of two years' probation on the terms proposed by the sentencing judge.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Braidwood"

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